

<p style="text-align: right;">[121]</p> <p>1           Douglas Berlent 2       going with this. 3        MR. MONAGHAN: Thank you. 4       I appreciate that. That helps. 5       Q. Mr. Maxwell, were you, also, doing work 6     for something called "Cats, Cats and More Cats"? 7       A. I don't recall the name. 8       Q. It's on Page 3 or however this is, 9     horizontally. 10      A. I would rely on the database to tell me 11    what I did, but I did not sell any product to them, 12   to the best of my recollection. 13      Q. You have an entry here called, right 14   under Gloryvision, "Jake's Doghouse." What is 15   that? 16      A. From what I recall, it was a catalogue 17   of pet items. 18      Q. Did you send my clients' CDs or any of 19   them cassettes to Jake's Doghouse, pets.com, Pet 20   Smart? Any of those? 21      A. I would have to rely, solely, upon the 22   database. I couldn't recall from memory. 23      Q. The database reflected in this exhibit? 24      A. Yes. 25      Q. Well, please take a look.</p>	<p style="text-align: right;">[123]</p> <p>1           Douglas Berlent 2       activities of what I -- 3       Q. This music, the Plaintiffs' music? 4       A. Yes. 5       Q. Okay. Fine. 6       Okay. Now, all right. Thank you. 7       All right. Let's move on. 8       And so the same would be true with 9     respect to other entries that say "Sent Samples"? 10   For example, you have pets.com, Sent Samples, 11   mentioning Lisa Erikson, ring bells? 12   A. No, it does not. 13   Q. All right. 14   A. But I would need to rely on what was 15   present in this database because I'm the only 16   person who would have entered that information. 17   Q. And you were the person making the 18   decisions as to whom the product would be sent? 19   A. Yes. 20   Q. Who did you deal with at The Orchard? 21   A. At what time period? 22   Q. Well, when was this database created? 23   A. I do not know. 24   Q. Okay. There's a name here, Brian 25   Nicholas. Does that ring any bells?</p>
<p style="text-align: right;">[122]</p> <p>1           Douglas Berlent 2        MR. SHELOWITZ: I don't know 3     if I stapled it, the right way, 4     but this is -- 5       THE WITNESS: If you could 6     just -- You asked about Jake's 7     Doghouse? 8       MR. MONAGHAN: Right. 9       THE WITNESS: So, if you 10   can find Jake's Doghouse? 11      MR. SHELOWITZ: Right 12   here. 13      THE WITNESS: Just go 14   across to the right on that 15   column. Is there a column 16   that says "Materials Sent"? 17      MR. MONAGHAN: Yeah. It 18   says "Sent Samples." 19      THE WITNESS: Sent Samples. 20      So, if it says I sent a 21   sample, I sent a sample. 22      Q. How do you know those are a sample of 23   our clients' product? Is this entire exhibit 24   related to this case? 25      A. It's related to this music. My</p>	<p style="text-align: right;">[124]</p> <p>1           Douglas Berlent 2       A. No, it does not. 3       Q. Then there's a name on the document we 4     will see or will see Sam Perlman. Does that name 5     ring a bell? 6       A. Yeah, Sam, I remember because he was 7     the first person I spoke with when I got in contact 8     with The Orchard. 9       Q. Have we ever dealt with each other 10   before, you and I, on any matter over the years? 11   You look familiar. 12   A. Not as far as I know. 13   Q. Okay. Did you sell any physical 14   product of the Plaintiffs? By that, I mean hard 15   copies? 16   A. Did I, personally -- 17   Q. Your company? 18   A. -- sell? My company? 19   Q. Media Right Productions? 20   A. I know that we shipped, approximately, 21   nine copies of the CD to The Orchard and, as far as 22   my recollection, those are the only copies that I 23   ever, personally, shipped for sale or potential 24   sale. 25   Q. When you say you shipped nine copies to</p>

<p style="text-align: right;">[125]</p> <p>1           Douglas Berlent      2   The Orchard for sale, what was your understanding      3   of how The Orchard would use those nine copies that      4   you sent?      5       A. The same way that they were going to      6   use my music that I sent to them, that they would      7   use their best efforts to sell and promote them.      8       Q. I need the mechanics, though. How did      9   they do it?      10      A. I don't know.      11      Q. Well, don't they have to convert the      12   CDs and you didn't send them a master; correct?      13      A. Master is --      14      Q. -- term of art?      15      A. -- an ambiguous term to me because      16   every CD is, potentially, a master.      17      Q. Right. And how is that the case?      18      A. I sent to them, approximately, nine CDs      19   of each title, from my recollection.      20      Q. Right. And what did you understand      21   they were going to do with them?      22      A. Use their best efforts to promote and      23   sell the music.      24      Q. And how was the music to be delivered      25   to the consumer?</p>	<p style="text-align: right;">[127]</p> <p>1           Douglas Berlent      2   delivered the CDs to The Orchard, that they were      3   going to sell it to iTunes because iTunes did not      4   exist at that time.      5       Q. Were there others that existed?      6   Napster or some others?      7       A. I do not recall.      8       Q. When you sent those nine hard copies to      9   The Orchard, was it your understanding they were      10   going to sell hard copies, the actual CDs and      11   cassettes?      12      A. That was one of my understandings, yes.      13      Q. What was your other understanding, if      14   any?      15      A. That they were going to do whatever      16   they do to create sales of that music.      17      Q. You have to be more specific. How were      18   they going to do that?      19      A. Honestly, I don't recall. I know, you      20   know, some of the things that they --      21      MR. SHELOWITZ: There's no      22   question.      23      THE WITNESS: No question.      24      Okay.      25      MR. SHELOWITZ: You answered</p>
<p style="text-align: right;">[126]</p> <p>1           Douglas Berlent      2       A. That wasn't really my -- I'm not      3   involved. The Orchard, I didn't know how they      4   were, you know, all the various things that they      5   were doing.      6       Q. Well, do they sell hard copies?      7       A. That was one of the things that they      8   sold.      9       Q. Okay. And, when you sent them nine,      10   were you sending that for the purpose of testing      11   the waters to see how well those would do?      12       A. It wasn't a test. They asked me to      13   send, from my recollection, approximately,      14   10 copies of all of our titles and that's what we      15   did.      16       Q. I understand. And, when you sent them,      17   did you understand they were going to use any of      18   those as masters for the purpose of distributing it      19   to eTailers, such as iTunes?      20       A. To the best of my recollection, iTunes      21   didn't exist then.      22       Q. Then your answer would be you didn't      23   understand that to be the case?      24       A. I did not understand that to be the      25   case that they were going to, at that time when I</p>	<p style="text-align: right;">[128]</p> <p>1           Douglas Berlent      2   the question.      3       Q. Okay. I'm going to ask you: What were      4   you about to say? There's the question.      5       A. I don't remember what I was about to      6   say.      7       Q. You started with "honestly."      8       A. I don't recall.      9       Q. Did you or anybody that you contacted      10   in connection with my clients' CDs, tapes and      11   cassettes sell any of those CDs, cassettes or      12   tapes, that includes you or anyone else that you      13   contacted, including The Orchard?      14       A. Can you state the question again for      15   me, please?      16       Q. How many copies of Cats and Dogs or any      17   of the CDs or tapes were sold through your company,      18   either directly or indirectly?      19       A. I do not know.      20       Q. Did you ever pay any money to my      21   clients for the sale of any of the CDs or      22   cassettes?      23       A. No, I did not.      24       Q. Did you ever account to the Plaintiffs      25   prior to this litigation for any sales of CDs or</p>

<p style="text-align: right;">[129]</p> <p>1           Douglas Berlent      2 cassettes that had been provided to you?      3     A. No, I did not.      4     Q. How long was the Media Right Product      5 Representation Agreement? What was the term of      6 that? How long was it to last?      7     A. I understood it to still be in effect      8 and it was to last until one of the parties      9 canceled it.      10    Q. Reading the last paragraph, "The term      11 of this agreement shall be thirty-six months from      12 the date of signing unless terminated as specified      13 by the agreement," is that what you're referring      14 to?      15    MR. SHELOWITZ: Objection      16 to the form.      17    You asked him what his      18 understanding was and he      19 testified about what his      20 understanding was.      21    MR. MONAGHAN: Yeah.      22    Q. Was that the paragraph that you had in      23 mind when you gave that answer?      24    A. No, it was not.      25    Q. Okay. What language in the Agreement</p>	<p style="text-align: right;">[131]</p> <p>1           Douglas Berlent      2     A. Yes, I did.      3     Q. And what words did I read to you that      4 gave more than 36 months?      5     MR. SHELOWITZ: Objection.      6 The contract speaks for itself.      7     MR. MONAGHAN: That's not      8 the question. The question was:      9     Was there anything in what I just      10 read that his understanding      11 suggests gave him more than      12 36 months? I'm going to ask him      13 what words were there?      14    MR. SHELOWITZ: If you want      15 him to reread it, you can ask him      16 that. If you want to hear it      17 again or you want to read,      18 whatever you think.      19    MR. MONAGHAN: You need to      20 read the language again?      21    MR. SHELOWITZ: Or you can      22 look at it, whatever you want.      23    THE WITNESS: Based on what      24 you just read to me --      25    MR. MONAGHAN: Yeah.</p>
<p style="text-align: right;">[130]</p> <p>1           Douglas Berlent      2 provides that it is indefinite unless terminated?      3     A. That was my understanding of the      4 Agreement, as I recall.      5     Q. Okay. Now, I'm going to read that      6 entire paragraph and ask you if it squares with      7 your understanding. "The term of this agreement      8 shall be thirty-six months from the date of signing      9 unless terminated as specified by the agreement.      10 This representation of Songs For Dogs and Songs For      11 Cats by Media Right Productions, may be canceled by      12 either party with written notification provided at      13 least 30 days prior to the desired termination      14 date." Did you hear what I just read, Mr. Maxwell?      15    A. Yes, I did.      16    Q. Okay. Was that your understanding of      17 the provisions for the term of the Agreement and      18 termination of the Agreement?      19    A. That was not my understanding of what I      20 recalled the terms to be of the Agreement.      21    Q. Did you draft that clause?      22    A. I do not recall if it was myself or      23 Ellen or a combination of both of us.      24    Q. Do you understand what I just read you      25 to give you more than 36 months?</p>	<p style="text-align: right;">[132]</p> <p>1           Douglas Berlent      2     THE WITNESS: Could you now      3 ask me the question that you      4 would like to know?      5     Q. Okay. Doesn't that mean that the      6 outside limit of the Agreement is 36 months unless      7 sooner terminated?      8     A. Based on what you read, yes. I would      9 think so.      10    Q. Were there any written amendments to      11 this Agreement?      12    A. Not that I recall.      13    Q. And, to the best of your knowledge, was      14 the Agreement ever terminated by either side,      15 formally, by a writing?      16    A. No, it was not terminated.      17    Q. And you acknowledge, sir, there should      18 have been some payments made to the Plaintiffs,      19 some payments; isn't that right?      20    A. Yes, I do acknowledge.      21    Q. And you acknowledge there should have      22 been an accounting to Plaintiffs at some point;      23 correct?      24    A. Yes, I do.      25    Q. And who, within your company, had the</p>

<p style="text-align: right;">[133]</p> <p>1           Douglas Berlent      2 responsibility for rendering an accounting to the      3 Plaintiffs?      4       A. Myself.      5       Q. Who had the responsibility for making      6 payment to the Plaintiffs?      7       A. Myself.      8       Q. Did you ever enter into an agreement      9 with The Orchard, a written agreement regarding the      10 sales of the Plaintiffs' CDs and tapes?      11      A. I believe yes, I did enter an agreement      12 with The Orchard and part of that agreement was to      13 sell Plaintiffs' CDs and tapes along with my music.      14      Q. Okay. I'm going to show you now --      15     MR. SHELOWITZ: I think      16 we have a copy of that.      17     MR. MONAGHAN: You have it?      18     MR. SHELOWITZ: Yeah.      19     Q. Mr. Shelowitz is related to you; isn't      20 he, Mr. Maxwell? Is he a cousin or something?      21     A. Not by blood.      22     THE WITNESS: What does      23 this say?      24     MR. SHELOWITZ: This is      25 a letter, February 1st, 2000,</p>	<p style="text-align: right;">[135]</p> <p>1           Douglas Berlent      2 "Music For Lovemaking      3 "Music For Lovemaking II      4 "Sounds Of The Womb      5 "A Celebration Of Motherhood      6 "Songs For Dogs      7 "Songs For Cats      8 "Golf's Greatest Hits I      9 "Cigar Smokin' Sounds      10 "Primal Pounding      11 "H2Overtures," it looks like.      12     "Being The Best," and it      13 continues, "Thank you, and I look      14 forward to great success."      15     "Yours truly," it's printed      16 "Doug Maxwell" and signature, and      17 he's going to ask you if that's      18 your signature.      19     Q. Is that your signature, Mr. Maxwell?      20     A. Yes, it is.      21     Q. Okay. Is this letter dated      22 February 1st, 2000?      23     A. Yes, it is.      24     Q. Can you tell me how it is you were      25 telling Mr. Perlman on February 1st that you were</p>
<p style="text-align: right;">[134]</p> <p>1           Douglas Berlent      2 Sam Perlman, The Orchard.      3        "This letter confirms" --      4 I'm going to read it, if I can      5 help Doug, for the record.      6       MR. MONAGHAN: Yeah. Sure.      7       MR. SHELOWITZ: This is a      8 letter dated February 1st, 2000.      9 It's to Sam Perlman at The Orchard.      10 The letterhead says "Media Right      11 Productions."      12       Says, "Dear Sam,      13        "This letter confirms our      14 conversation of today:      15        "The audio CD titles listed      16 below will be distributed by The      17 Orchard under the terms and      18 conditions listed in your      19 distribution agreement.      20        "My signature below confirms      21 our acceptance of all your      22 specified terms and conditions."      23       And then it says, in bold      24 caps, not bold but caps, "TITLES      25 FOR DISTRIBUTION:</p>	<p style="text-align: right;">[136]</p> <p>1           Douglas Berlent      2 gonna let him distribute these titles from my      3 clients when the Agreement, the Product Rep      4 Agreement, isn't dated until -- isn't signed by you      5 until the 7th of February, six days later, and by      6 my client, Ellen Bernfeld, 23 days later,      7 February 24th, 2000?      8       A. I can do my best to offer a number of      9 explanations.      10      Q. I just want a truthful explanation.      11      A. The truthful explanation would then be,      12 to the best of my recollection, I don't know how      13 that happened, specifically.      14      Q. Okay. That's fine.      15      But you agree with me that you,      16 actually, were telling Mr. Perlman and giving The      17 Orchard rights that you had no written agreement to      18 give them as of February 1st, 2000, whatever your      19 construction is of the Product Rep Agreement?      20      A. I can't agree with that because any of      21 explanations I would offer that are plausible      22 within my world, such as I can't see, proofreading,      23 whether 1 is 7 or know which dates apply going back      24 that far, but I can tell you, truthfully, from the      25 understanding that Ellen and I shared, she knew</p>

<p style="text-align: right;">[137]</p> <p>1           Douglas Berlent      2 about The Orchard because it was the main premise      3 of our discussion at that time. She was excited by      4 it and knew that that was one of the main things      5 that was underway. I would not have sent the      6 titles without her authorization or knowing about      7 it. I, unfortunately, can't tell you the exact      8 details of what transpired, eight years ago, that      9 accounts for why there's a discrepancy in the date,      10 but I can swear under oath that I did not send the      11 materials to The Orchard without your client Ellen      12 Bernfeld's knowledge.</p> <p>13 Q. Now, did you say, a moment ago, you      14 can't tell a 1 from a 7?</p> <p>15 A. I offered that as a possible      16 explanation of what could have happened.</p> <p>17 Q. Are you talking about the date next to      18 your signature; right?</p> <p>19 MR. SHELOWITZ: You're      20 both looking at two different      21 agreements. He's looking at      22 the --</p> <p>23 MR. MONAGHAN: Please show      24 him the second page, the      25 signature page.</p>	<p style="text-align: right;">[139]</p> <p>1           Douglas Berlent      2 question is: Do I see vagueness      3 in my signature date, the answer      4 is not, but supporting truthfulness      5 of what I said, how was I to get      6 the copies I sent to The Orchard      7 if not from Ellen Bernfeld, herself?</p> <p>8 MR. MONAGHAN: I can't answer      9 that question. I can only ask the      10 questions.</p> <p>11 THE WITNESS: I understand and      12 I, respectfully, I'm just trying to      13 say.</p> <p>14 Q. You agree with me that you provided      15 copies of my clients' CDs to Mr. Perlman at The      16 Orchard before there was a signed Agreement; isn't      17 that right? Yes or no?</p> <p>18 A. I cannot agree to that, definitively,      19 from the best of my recollection because I don't      20 think I would have done that.</p> <p>21 Q. Okay. All right.</p> <p>22 Now, your letter to Mr. Perlman,      23 February 1st, Maxwell-4 says, "The audio CD titles      24 listed below will be distributed by The Orchard      25 under the terms and conditions listed in your</p>
<p style="text-align: right;">[138]</p> <p>1           Douglas Berlent      2 MR. SHELOWITZ: This is the      3 Product Representation Agreement.      4 That's the one he's talking about.</p> <p>5 THE WITNESS: Right.</p> <p>6 Q. Is that what you were referring to?</p> <p>7 A. No.</p> <p>8 Q. Well, what was the 1 and 7?</p> <p>9 MR. SHELOWITZ: This, here,      10 is the letter to Orchard.</p> <p>11 THE WITNESS: Mitch and      12 yourself had instructed me that      13 this letter was from February 1st.      14 You asked about how there could      15 be a discrepancy that I could      16 send the CD to The Orchard when      17 the Agreement that we signed was      18 on the 7th.</p> <p>19 MR. MONAGHAN: No. I'm      20 suggesting that my client signed      21 it on February 24th and I don't      22 see any vagueness in her date.      23 Do you? If you look at the      24 signature page, it says "2/24."      25 THE WITNESS: If your</p>	<p style="text-align: right;">[140]</p> <p>1           Douglas Berlent      2 distribution agreement." That's what it said.      3 Did you have a separate distribution      4 agreement with The Orchard?</p> <p>5 A. I do not recall. What do you mean by      6 separate?</p> <p>7 Q. Well, did you have a distribution      8 agreement with The Orchard?</p> <p>9 A. Yes.</p> <p>10 Q. All right. Is that anywhere in this      11 room, to your knowledge?</p> <p>12 MR. SHELOWITZ: Maybe,      13 you want to show him      14 something? He can't see      15 what's right in front of      16 his face.</p> <p>17 Q. Did you provide a copy of the      18 distribution agreement with The Orchard to us in      19 your document production?</p> <p>20 A. I, personally, did not.</p> <p>21 Q. Were you aware that any such agreement      22 had been provided to us?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And is that distribution      25 agreement Maxwell Exhibit 5?</p>

<p style="text-align: right;">[141]</p> <p>1           Douglas Berlent      2         All right. Exhibit 5 is a two-page      3         document. It's bearing Bates 17 and 18. It has a      4         reference up top "Paul Millman, Esquire," with some      5         phone numbers, date of July 18, 2007. Prior fax      6         date of 5/29/2007, Paul Millman.</p> <p>7         Below that, "From: The Orchard,      8         May 10, 2007," and I mean, to me, this appears to      9         be a document that your prior Counsel, Paul      10        Millman, obtained, directly, from The Orchard.      11        Does that sound correct?</p> <p>12        A. That does sound correct.</p> <p>13        Q. Okay. And that's your understanding?</p> <p>14        A. That is my understanding.</p> <p>15        Q. You didn't have a copy of this      16        agreement, either?</p> <p>17        A. No, I did not.</p> <p>18        Q. Okay. What happened to -- Is there a      19        signature page with this agreement?</p> <p>20        A. Is that a question I should answer?</p> <p>21        Q. Yeah. Is there a signature page with      22        this agreement?</p> <p>23        A. I don't recall.</p> <p>24        Q. How do you know this is your      25        distribution agreement?</p>	<p style="text-align: right;">[143]</p> <p>1           Douglas Berlent      2         February 1st, Exhibit 4, refers to "audio CD      3         titles"; correct? Do you remember that phrase?      4         Your Counsel, Mr. Shelowitz, read it.</p> <p>5         A. Is that --</p> <p>6         MR. SHELOWITZ: The document      7         says "TITLES FOR DISTRIBUTION,"      8         and it says, in the sentence, "The      9         audio CD titles listed below will      10        be distributed by The Orchard under      11        the terms and conditions listed in      12        your distribution agreement."</p> <p>13        Q. Does the reference -- Does the word      14        "titles" -- Is the word "titles" synonymous to you      15        with CDs and tapes?</p> <p>16        A. No.</p> <p>17        Q. Okay. How is it different?</p> <p>18        A. Rhetorically, are you asking in the      19        broad sense of why a title is different?</p> <p>20        Q. In the sense of this transaction?</p> <p>21        A. Could you restate the question, please?</p> <p>22        Q. You said it was different, titles      23        doesn't mean the same thing as CDs and tapes, and I      24        said how is it different in your mind? And you      25        said in the broad sense? And I said no, in this</p>
<p style="text-align: right;">[142]</p> <p>1           Douglas Berlent      2         A. I would rely on The Orchard producing      3         my distribution agreement by the request of my      4         Counsel.</p> <p>5         Q. Is this just a standard distribution      6         agreement --</p> <p>7         MR. SHELOWITZ: Objection.</p> <p>8         MR. MONAGHAN: Let me just      9         finish.</p> <p>10        -- standard distribution      11        agreement that you understand      12        as obtained from The Orchard      13        and you are supposing this is,      14        in fact, the one that you had      15        at the time?</p> <p>16        THE WITNESS: Yes, I'm      17        making that supposition.</p> <p>18        Q. Okay. So, you don't, actually, have a      19        copy of the distribution agreement which is      20        referred to in the letter of February 1st to Sam      21        Perlman, the exhibit I just asked you about which      22        was Number 4; is that right?</p> <p>23        A. No, I do not, actually, have a copy of      24        that agreement.</p> <p>25        Q. Okay. Now, I notice that the letter of</p>	<p style="text-align: right;">[144]</p> <p>1           Douglas Berlent      2         transaction?</p> <p>3         A. They were referenced as to how the      4         music was being delivered to The Orchard for      5         distribution.</p> <p>6         Q. You were delivering titles and your      7         Product Representation Agreement referred to CDs      8         and tapes. Didn't use the word "titles"; did it?</p> <p>9         A. Used recordings.</p> <p>10        Q. Okay.</p> <p>11        A. So, the title of the recordings.</p> <p>12        Q. Right. And you told us, earlier, that      13        among the activities that The Orchard was to      14        perform for you was, actually, selling hard copies      15        of my clients' CDs and tapes; am I right?</p> <p>16        Did you say that, earlier?</p> <p>17        A. Yes.</p> <p>18        Q. But did you, actually, deliver hard      19        copies to The Orchard or did you deliver titles?</p> <p>20        What did you give them?</p> <p>21        A. I delivered the items that are here on      22        the table in exhibits.</p> <p>23        Q. I think you said nine --</p> <p>24        A. Approximately.</p> <p>25        Q. -- correct? Approximately, nine?</p>

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[37] (Pages 145 to 148)

[147]

1                   Douglas Berlent  
 2       A. Approximately, nine.  
 3       Q. How were you able to recall that with  
 4     that degree of specificity?  
 5       A. Because, through the course of this  
 6     litigation, it had come to my attention, through  
 7     The Orchard's database, how many he logged in as  
 8     receiving.  
 9       Q. I see.  
 10      And The Orchard agreement that you gave  
 11     me, which you suppose was the agreement that you  
 12     had, talks about selling the recordings in eStores;  
 13     is that right?  
 14      Do you need me to read that or have  
 15     Mr. Shelowitz read it?  
 16      A. I would trust you if you tell me that's  
 17     what it says and I would, of course, agree.  
 18      Q. You don't have to agree with me.  
 19      A. Okay then.  
 20      Q. I've been wrong many many times.  
 21      A. Well then.  
 22      Q. I will read it.  
 23      "We agree to provide you" --  
 24      Now, are we in agreement that the "we"  
 25     here is Media Right Productions and the "you" is

1                   Douglas Berlent  
 2     here that says The Orchard is going to sell hard  
 3     copies?  
 4       MR. SHELOWITZ: Again, you  
 5     can ask him what his understanding  
 6     of the agreement is. I can look  
 7     here and find a place where it  
 8     says --  
 9       MR. MONAGHAN: No. Please.  
 10      MR. SHELOWITZ: It says it  
 11     right here, but you're putting  
 12     words into his mouth. His  
 13     understanding, please ask him  
 14     everything you want.  
 15      If you want to ask what's  
 16     written in the agreement, I see  
 17     here, "You agree to supply us  
 18     with compact discs." It's a  
 19     two-page agreement. If this  
 20     is the agreement, whatever it  
 21     says, it says. We don't object  
 22     to what it says.  
 23      If you want to ask what  
 24     his understanding is, of course,  
 25     he will be more than happy to

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1                   Douglas Berlent  
 2     The Orchard?  
 3       MR. SHELOWITZ: I think we can  
 4     agree.  
 5       MR. MONAGHAN: If that's what  
 6     the contract says?  
 7       Q. Okay. "We agree to provide you  
 8     throughout the Territory and during the Sales  
 9     Period with listing of your Recordings in E-Stores  
 10    during the Term. We will pay you Seventy (70%)  
 11    percent of our Net Income, accounted for quarterly  
 12    (please see www.theorchard.com for Accounting and  
 13    Payment Policy), which directly results from sales  
 14    of any of your Recordings."  
 15      Isn't this agreement limited to sales  
 16     of electronic media?  
 17       MR. SHELOWITZ: Objection.  
 18      The document speaks for itself.  
 19       MR. MONAGHAN: Well, it  
 20     does speak for itself, but I  
 21     can't see anything here other  
 22     than dealing with E-Sales,  
 23     electronic media.  
 24       Q. You've had an opportunity to look at  
 25     this agreement, I'm sure. Is there anything in

1                   Douglas Berlent  
 2     share that with you.  
 3       Q. There came a time when you received  
 4     some payments from The Orchard for sales of my  
 5     clients' products; isn't that right?  
 6       A. Yes.  
 7       Q. And when was that?  
 8       A. I do not know.  
 9       Q. Do you have a copy of 7, which is your  
 10    document production?  
 11       A. Yes.  
 12       MR. SHELOWITZ: Yes,  
 13     we do.  
 14       Q. Okay. Mr. Maxwell, there are a batch  
 15    of checks, copies of front and backs of checks  
 16    payable to Media Right Productions from The  
 17    Orchard. The first one is August '04. The second  
 18    one is February '05. The third one is August '05.  
 19    The fourth one is May '05. November '05 is the  
 20    next one. February '06, May '06, August '06,  
 21    November '06, August '07, May '07, February '07.  
 22    The checks in the time frame I just described, do  
 23    these checks from The Orchard to Media Right  
 24    Productions, in part or whole, represent the  
 25    payments received by Media Right with respect to my

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<p>1           Douglas Berlent      2 clients' products? In part or in whole?      3       A. I do not recall.      4       Q. Can you tell us why you gave us these      5 checks in the document production?      6       A. Because your question said these      7 checks, in part or in whole, represent any payments      8 to your client and I'm not sure which checks,      9 specifically, would contain payments to your      10 client.</p> <p>11      MR. SHELOWITZ: For the      12 record, these were produced      13 by The Orchard, these checks --</p> <p>14      MR. MONAGHAN: Right.      15 As a Defendant in this case.</p> <p>16      MR. SHELOWITZ: As Defendant      17 in this case.</p> <p>18      Q. Okay. Have you had a chance to look at      19 any of these checks, Mr. Maxwell?</p> <p>20      A. No, I have not.</p> <p>21      Q. And, when you got a check from The      22 Orchard, it was accompanied by some sort of      23 accounting or a statement?</p> <p>24      A. No, it was not.</p> <p>25      Q. How did you know whether you were</p>	<p>1           Douglas Berlent      2 Productions?      3       A. I would have to ask my Counsel if this      4 was that document.      5       Q. Well, go ahead.      6       THE WITNESS: Is this the      7 accounting presented to us by      8 The Orchard?</p> <p>9       MR. SHELOWITZ: These were      10 documents, all the data you see      11 showing the royalties and numbers      12 of sales. All of that has been      13 produced by The Orchard as      14 requested, again, by prior Counsel      15 and it was turned over, several      16 times, I think to your good      17 offices.</p> <p>18      MR. MONAGHAN: Right.      19      Q. This document - was a document like      20 this produced to you in the course of the      21 relationship with The Orchard showing sales?      22      A. No, it was not.      23      Q. Again, you just, simply, trusted The      24 Orchard to pay you what you were entitled to?      25      A. I did make an attempt, at one point, to</p>
[150]	[152]
<p>1           Douglas Berlent      2 getting paid what you were supposed to get paid?      3 Just trusted them?</p> <p>4       A. I did.</p> <p>5       Q. Well then, sitting here today, do you      6 have any idea of how much money was made on the      7 sales of Songs For Dogs or Songs For Cats?</p> <p>8       A. Yes, I do.</p> <p>9       Q. How much?</p> <p>10      A. The amount paid to Media Right      11 Productions is, approximately, \$382.00.</p> <p>12      Q. Right now, you're able to say that very      13 definitively with certainty, and how did you come      14 to that conclusion?</p> <p>15      A. An accounting was provided.</p> <p>16      Q. By?</p> <p>17      A. The Orchard.</p> <p>18      Q. Where is that accounting?</p> <p>19      A. I believe its been presented to you as      20 part of the documents.</p> <p>21      Q. Can you look at Bates Page 19 in the      22 exhibit?</p> <p>23      A. Okay.</p> <p>24      Q. Is that one of the accountings or an      25 accounting from The Orchard to Media Right</p>	<p>1           Douglas Berlent      2 try to understand how to log onto their system, but      3 I couldn't read it and I couldn't navigate through      4 it.      5       So, in answer to your question, I did      6 trust them.      7       Q. So, why shouldn't we assume that all      8 these checks that you gave us from The Orchard      9 pertain to our client?</p> <p>10      A. Because the accounting that they      11 provided shows otherwise.      12      Q. You just told us they didn't give you      13 an accounting.      14      A. The accounting that they provided,      15 which you asked me to look at.      16      Q. This document that was produced in this      17 lawsuit is the accounting that you're talking      18 about?      19      A. Yes.      20      Q. And this document didn't even exist      21 before this lawsuit was filed; did it?      22      MR. SHELOWITZ: Objection.      23      MR. MONAGHAN: To your      24 knowledge?      25      THE WITNESS: I would</p>

<p style="text-align: right;">[153]</p> <p>1           Douglas Berlent      2       assume that it did exist, but      3       not in printed form. I do not      4       have it nor was I given it.      5       Q. Okay. So, does this confirm to you      6       that these various iTunes and eTailers of music,      7       actually, had my clients' music available for sale?      8       MR. SHELOWITZ: Objection.      9       MR. MONAGHAN: If you      10      know?      11       THE WITNESS: I did not      12      know.      13       Q. So, let me understand this. You gave -      14      You, Media Right Production, you gave Media Right      15      Productions --      16       MR. SHELOWITZ: The Orchard.      17       MR. MONAGHAN: I'm sorry.      18       Yeah.      19       Q. You, Media -- You, Media Right      20      Productions --      21       MR. SHELOWITZ: I didn't      22      do anything.      23       MR. MONAGHAN: -- gave      24      The Orchard these titles to      25      sell; is that right? The titles,</p>	<p style="text-align: right;">[155]</p> <p>1           Douglas Berlent      2       in 2004.      3       Q. But this was an agreement that was      4       entered in 2000; correct?      5       A. Correct.      6       Q. And you gave it to The Orchard in the      7       year 2000; correct?      8       A. Correct.      9       Q. So, it's your understanding there      10      wasn't a sale of a single digital download of this      11      music before the earliest date of one of these      12      checks?      13       A. It's my understanding because I didn't      14      get paid for any sales on any of the music that      15      they had for that period. I did not receive any      16      payment from The Orchard.      17       Q. So, what accounted for this sudden      18      resurgence in interest in our clients' music?      19       MR. SHELOWITZ: Objection      20      to the form.      21       Q. Do you have any idea why, all of a      22      sudden, if there are not too many copies as far as      23      you folks are concerned, what happened in 2004 or      24      2005 that caused this music to be sold when,      25      apparently, as far as you know, it wasn't sold at</p>
<p style="text-align: right;">[154]</p> <p>1           Douglas Berlent      2       my clients' titles?      3       THE WITNESS: Yes, I did.      4       Q. You gave them to them, and, sitting      5      here today, before this litigation and before we      6      got this production, you had no accounting from The      7      Orchard as to the sales, no formal written      8      accounting as to the sales of my clients' products;      9      is that right?      10       A. No, I did not.      11       Q. How about your own compositions that      12      were being sold through The Orchard, did you get an      13      accounting on those?      14       A. The accounting was made available to      15      any Orchard client, but it was made available on an      16      on-line format and so I never checked because I      17      wasn't able to navigate through the on-line format.      18       Q. These checks that The Orchard just      19      produced are of relatively recent vintage; aren't      20      they? I don't think any one of them is older than      21      2005. Did you hear me list the dates?      22       A. Yes, I did.      23       Q. You didn't hear me say anything before      24      2005; did you?      25       A. Actually, I did hear you say something</p>	<p style="text-align: right;">[156]</p> <p>1           Douglas Berlent      2       all from 2000 to 2004 or 5?      3       A. I would not know.      4       (Recess taken.)      5       Q. Do you know what mechanical license is,      6      Mr. Maxwell?      7       MR. SHELOWITZ: Asked and      8      answered.      9       MR. MONAGHAN: It's okay.      10      I don't remember.      11      I'm going to ask it again.      12      THE WITNESS: Yes.      13      Q. Okay. What is it?      14      A. In my understanding of it, it's a fee      15      that you pay to the owner of the song copyright for      16      use of their song on a CD.      17      Q. Okay. My question and your Counsel      18      said I asked you about mechanical royalties before.      19      Now, I'm asking about a mechanical license. What      20      does a mechanical license entitle the licensee to      21      do and what is it the licensor is licensing?      22      Isn't it the right to make copies?      23      A. From my understanding of how I've      24      understood a mechanical license --      25      Q. Uh-huh.</p>

<p style="text-align: right;">[157]</p> <p>1           Douglas Berlent      2       A. -- I think it's a royalty that you pay      3       to the writer/publisher of a song independent of      4       the recording.      5       Q. But isn't it based on the number of      6       copies?      7       A. Number of copies sold, I believe.      8       Q. Yeah.      9       A. I mean each license is different.      10      Q. Are you familiar with Section 101 of      11     the Copyright Act?      12      A. No.      13      Q. Are you a member of A.F.T.R.A.? S.A.G.? Any of those?      14      A. No, I'm not.      15      Q. Are you familiar with the musicians' union, the American Federation of Musicians?      16      A. Vaguely.      17      Q. Well, you've had occasion through isn't one of the services that you offer is providing musicians for studio use by artists?      18      A. Yes.      19      Q. Don't those musicians belong to unions?      20      A. Some may.      21      Q. Don't they have to be paid union scale</p>	<p style="text-align: right;">[159]</p> <p>1           Douglas Berlent      2       A. Yes, I am.      3       Q. And you and Mr. Palladino - did you have a garage band or something when you were younger?      4       A. We did.      5       Q. See that. I kind of guessed that.      6       And you never became a member of a musicians' union?      7       A. I believe that we were members of the union very early in our career.      8       Q. Okay. Did you come to learn, at any time, that my clients' music was being sold on Amazon?      9       A. I did not know that until this litigation.      10      Q. Did you come to learn how the music came to be available on Amazon?      11      A. I came to understand that it was through the efforts of The Orchard.      12      Q. Okay. And how did you come to that understanding? Who told you that?      13      A. I don't recall, specifically.      14      Q. Did you come to learn that the audio CD Songs For Dogs by Media Right Productions was being</p>
<p style="text-align: right;">[158]</p> <p>1           Douglas Berlent      2       when they participate in making music?      3       MR. SHELOWITZ: Objection.      4       Irrelevance.      5       You can answer.      6       THE WITNESS: Oh.      7       MR. SHELOWITZ: If you know the answer, yeah.      8       THE WITNESS: No. As far as I know, they do not need to be paid union scale if they're not part of a musicians' union.      9       Q. No. I'm talking about those who are union members?      10      A. I'm not specific with the terms of the union.      11      Q. Don't you know that the musicians who participate in making the Songs For Dogs and Songs For Cats have certain rights?      12      A. I would not know that information.      13      Q. How long have you been in the music business?      14      A. About 20, 20 years or so.      15      Q. And you're a musician, yourself; aren't you?</p>	<p style="text-align: right;">[160]</p> <p>1           Douglas Berlent      2       offered on Amazon for \$15.98, new? Did you learn that?      3       MR. SHELOWITZ: Objection to the form.      4       MR. MONAGHAN: At any time?      5       THE WITNESS: No, I can't say that I did learn that.      6       Q. Well, when I say "learn that," learn it either from papers in the case? From verbal sources? From, actually, looking at amazon.com?      7       A. I did not look at amazon.com. I did not recall hearing it from verbal sources that it was sold for \$15.00.      8       Q. Don't hold me to the price. Just that it was on there?      9       A. Yes, I did hear that it was on amazon.com.      10      Q. Right. And being offered by Media Right Productions? Did you learn that, too?      11      A. That was brought to my attention, yes.      12      MR. SHELOWITZ: Objection to the form.      13      Q. Okay. And do you have your own compositions available for sale on amazon.com?</p>

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<p>1           Douglas Berlent      2       A. I would not know.      3       Q. Did you know the full name of my      4     clients' composition compilations, these at issue?      5       A. I'm not sure I understand the question.      6       Q. Well, the CD case that I have here is      7     Songs For Dogs and then, parenthetically, "(and the      8     people who love them)." Do you remember that being      9     part of the name?      10      A. I would not have remembered the      11    parenthetical. Its been a long time since I've      12   seen them.      13      Q. And the same with Cats, Songs For Cats      14   CD, and jewel case says "Songs For Cats (and the      15   people who love them)"; same answer?      16      A. Same answer.      17      Q. You don't have occasion to go and      18   monitor on amazon.com; do you? The Media Right      19   Productions products and music that's being offered      20   there, you don't do that from time to time?      21      A. No.      22      Q. Okay. I show you now Exhibit 12,      23   Maxwell-12, which is a printout from amazon.com      24   and, on the same page, it references Songs For Dogs      25   (and the people who love them) by my client and</p>	<p>1           Douglas Berlent      2     Productions?      3       MR. SHELOWITZ: Objection      4     to the form.      5       Q. You knew that before today; didn't you?      6       A. I knew that as part of the proceedings      7     in this litigation that was brought to my      8     attention.      9       Q. Right. Did you go and check out how      10   that came to be?      11      A. No. I, personally, did not.      12      Q. Well, did anyone on your behalf?      13      A. I would assume that my Counsel did.      14       MR. SHELOWITZ: By the      15     way, we haven't seen any claim      16     of copyright ownership by Media      17     Right Productions anywhere.      18       MR. MONAGHAN: You said      19     that before, but we showed it      20     to you in the Rule 26 production.      21       MR. SHELOWITZ: I don't see      22     any copyright ownership. Who says      23     it's copyright ownership? I don't      24     see anything where it says that.      25     You're asking questions and assuming</p>
[162]	[164]
<p>1           Douglas Berlent      2     then Songs For Dogs, Media Right Productions. You      3     see those?      4       A. Yes, I do.      5       Q. Okay. Did you ever claim a copyright      6     ownership of my clients' products?      7       A. No, I did not.      8       Q. Can you tell us why it is on -- You      9     reviewed the papers that were provided by the      10   Plaintiffs in this case under their production of      11   documents before you came here; didn't you?      12      A. No, I cannot say that I did.      13      (Plaintiffs' Exhibit      14   Maxwell-15, one-page iTunes      15   screen shot regarding Songs      16   For Cats, marked for      17   identification; Plaintiffs'      18   Exhibit Maxwell-16, one-page      19   iTunes screen shot regarding      20   Songs For Dogs, marked for      21   identification.)      22      Q. Mr. Maxwell, are you saying, until I      23     just asked you that question, you didn't know that      24     there was a listing on iTunes of my clients' music      25     with copyright claim by your company Media Right</p>	<p>1           Douglas Berlent      2     facts that were not in evidence and      3     not demonstrated.      4       MR. MONAGHAN: Let me show      5     you Maxwell-16. You've seen that      6     before. That's in our Rule 26.      7       MR. SHELOWITZ: Where does      8     it say copyright?      9       MR. MONAGHAN: Right where      10   it's highlighted.      11       MR. SHELOWITZ: Where?      12       MR. MONAGHAN: Where      13     there's a copyright symbol.      14       MR. SHELOWITZ: I don't      15     see. Okay. 2006. Okay.      16       MR. MONAGHAN: Did I read      17     that, correctly?      18       MR. SHELOWITZ: It says      19     "c 2006 Media Right."      20       MR. MONAGHAN: That means      21     copyright; doesn't it?      22       MR. KORIK: Just to be      23     accurate, it's circle p.      24       MR. SHELOWITZ: What's      25     circle p?</p>

<p style="text-align: right;">[165]</p> <p>1           Douglas Berlent      2           MR. KORIK: Photographic      3           recording copyright.      4           MR. SHELOWITZ: News to us.      5           Okay.      6           Q. You had no right to claim copyright      7           ownership of these compositions; did you?      8           A. No, I did not.      9           Q. You had no right to give copyright      10          rights to anyone else, either; did you?      11          A. No, I did not.      12          Q. And is it your testimony that you did      13          not authorize The Orchard to make copies?      14          A. I'm not sure I understand the question.      15          Q. Did you authorize The Orchard to make      16          copies of my clients' music?      17          A. I authorized them to market that music.      18          Q. Did you authorize The Orchard to allow      19          copyright claims to be made by either you, Media      20          Right, or by The Orchard?      21          A. No, I did not authorize them to make      22          copyright claims.      23          Q. And I show you now Exhibit 15 with the      24          same copyright claim by The Orchard on iTunes.      25          Have you seen that before?</p>	<p style="text-align: right;">[167]</p> <p>1           Douglas Berlent      2           Q. Does The Orchard claim copyright, the      3           same way it did -- I'm sorry. iTunes, does iTunes      4           have a listing on a screen shot for any of your      5           compositions that indicates someone other than you,      6           as, for example, The Orchard, has rights in your      7           music?      8           A. I would not know that.      9           Q. You were present at the mediation; were      10          you not?      11          A. Yes, I was.      12          Q. Okay. Did you hear Mr. Korik talk      13          about this subject matter at the mediation, this      14          issue of claiming of copyrights?      15          Didn't you talk about that?      16          A. I don't recall the specifics of what he      17          said.      18          Q. Did you have occasion to ever go back      19          to The Orchard and say how is it that this is being      20          sold on iTunes, indicating a copyright in Songs For      21          Cats and I, Media Right Productions, have a      22          copyright in Songs For Dogs? Did you ever take      23          that up with anybody at The Orchard?      24          A. No, I did not.      25          Q. Was there a reason you didn't?</p>
<p style="text-align: right;">[166]</p> <p>1           Douglas Berlent      2           MR. SHELOWITZ: Again, this      3           is --      4           MR. MONAGHAN: -- very hard      5           to see.      6           MR. SHELOWITZ: It's an      7           iTunes screen shot. There's a      8           "p" with a circle that says      9           2000 Orchard. Under there is      10          an image Songs For Cats.      11          THE WITNESS: I'm not      12          seeing it. I have not gone      13          to iTunes.      14          Q. Did you allow for the possibility, when      15          you gave the titles to The Orchard by that      16          February 1, 2000 communication with Sam Perlman,      17          did you allow for the possibility that you were now      18          putting this music out there on the Internet and      19          that anyone could make use of this? Did you know      20          that was possible?      21          A. I don't recall.      22          Q. How about your own music, has anyone      23          claimed a copyright to your music, other than      24          yourself?      25          A. Not that I know of.</p>	<p style="text-align: right;">[168]</p> <p>1           Douglas Berlent      2           A. I didn't know about it.      3           Q. Were you aware that digital copies of      4           my clients' music were being sold, on-line?      5           A. At what point?      6           Q. Any point?      7           A. During the process of this litigation,      8           yes.      9           Q. Well, I think you told us, when I asked      10          you about the Product Representation Agreement,      11          that the phrase "internet sites" to you meant and      12          included The Orchard; right?      13          A. Correct.      14          Q. And did that, also, include or subsume      15          in it places like iTunes?      16          A. It evolved to include that.      17          Q. So, that's the way iTunes sells the      18          tunes? Isn't it through digital downloading?      19          A. Yes.      20          Q. So then we can assume, correctly, that      21          you assumed at the time it did include the right to      22          digital download when you gave the tiles to The      23          Orchard?      24          A. Yes, I did assume that.      25          Q. And when did you ever have a</p>

<p style="text-align: right;">[169]</p> <p>1           Douglas Berlent      2 conversation with Ellen Bernfeld in which the      3 subject of digital downloading through iTunes was      4 discussed?</p> <p>5           A. We did not have this discussion through      6 iTunes because iTunes did not exist at the time,      7 but I do recall that we did discuss Internet and      8 digital dissemination.</p> <p>9           Q. What about MSN Music; are you familiar      10 with that?</p> <p>11          A. No, I'm not.</p> <p>12          Q. MusicMatch, are you familiar with that?</p> <p>13          A. No, I'm not.</p> <p>14          Q. Any of the following: MusicNet,      15 MusicNet Canada, MusicNow and RealNetworks?</p> <p>16          A. No.</p> <p>17          Q. Are you aware, sir, that as recently as      18 January of 2007, The Orchard was still showing      19 Songs For Cats with your company listed as the      20 artist?</p> <p>21          A. No, I was not.</p> <p>22          MR. MONAGHAN: Can we      23 mark that.</p> <p>24          (Plaintiffs' Exhibit      25 Maxwell-17, one-page screen shot</p>	<p style="text-align: right;">[171]</p> <p>1           Douglas Berlent      2 wasn't open to individual one record at a time.      3           Q. Did you change the UPC code on Songs      4 For Dogs and Songs For Cats?</p> <p>5          A. No, I did not.</p> <p>6          Q. Do you know if there are different UPC      7 codes for those, the very same product?</p> <p>8          A. I never looked.</p> <p>9          Q. On the exhibit, the Sam Perlman letter      10 which is Exhibit 4, I show you Maxwell Exhibit 4      11 right here. I show you --</p> <p>12          MR. SHELOWITZ: This is      13 the letter from Media Right      14 Productions to The Orchard.</p> <p>15          THE WITNESS: Okay.</p> <p>16          Q. You see the bar code up on the top;      17 right?</p> <p>18          A. I see a physical blur.</p> <p>19          Q. Okay. Well, I'll represent to you it's      20 a bar code.</p> <p>21          A. Okay.</p> <p>22          Q. Who put that there?</p> <p>23          A. I do not know.</p> <p>24          Q. And, beneath that bar code, it says,      25 "Media Right Productions, Songs For Dogs." Doesn't</p>
<p style="text-align: right;">[170]</p> <p>1           Douglas Berlent      2 regarding "The Orchard, Release      3 Info.," marked for identification.)</p> <p>4           Q. Did you tell The Orchard that you were      5 the record label for Songs For Cats and Songs For      6 Dogs?</p> <p>7          A. I don't recall using the specific term      8 "record label."</p> <p>9          Q. Well, can you explain how it is, if you      10 can mark those, that The Orchard is showing your      11 company as the record label?</p> <p>12          A. From what I recall, and I believe it's      13 still to be the case, the only way to get onto The      14 Orchard, even back in its earliest days, was to be      15 a record label. In other words, not an artist with      16 one record but to have more than one record, and      17 that was, specifically, what Russ was referring      18 Ellen to me about because we did have those titles      19 under the Media Right, quote, "label." That was      20 all my music and all me and Songs For Cats and      21 Songs For Dogs was included in that batch of music      22 that was sent to The Orchard.</p> <p>23          So, that is, most likely, why it was      24 put under the Media Right label because you'd have      25 to double-check me on it, but I believe that it</p>	<p style="text-align: right;">[172]</p> <p>1           Douglas Berlent      2 that mean that that's your bar code with your UPC      3 on this letter that you sent to Sam Perlman?</p> <p>4          A. That was not on the letter that I sent      5 to Sam Perlman.</p> <p>6          Q. You produced this. How did it get to      7 us?</p> <p>8          A. That was provided, as far as I know, by      9 The Orchard because I did not have a copy of that      10 letter. So, that could have been attached by them,      11 but I have no knowledge of how it was put there.</p> <p>12          Q. Well, since we didn't get it until you      13 produced it in this case, would you agree the only      14 possibilities are (a) you put it there or The      15 Orchard put it there?</p> <p>16          A. I would not agree to that because I do      17 not know how it got there.</p> <p>18          Q. Well, do you have a bar code that you      19 use on your properties?</p> <p>20          A. I used to. I don't think it's,      21 currently, functioning nor have I renewed it,      22 probably, for many years.</p> <p>23          Q. What would the function of this bar      24 code that says "Media Right Productions," beneath      25 it, Songs For Dogs, be?</p>

[173]	[175]
<p>1           Douglas Berlent      2         MR. SHELOWITZ: Objection      3         to the form. He testified he      4         doesn't know how it got there.      5         MR. MONAGHAN: That's not      6         the same question as what would      7         it be used for.      8         MR. SHELOWITZ: If you know?      9         THE WITNESS: What would a      10       bar code, in general, be used      11       for?      12       MR. MONAGHAN: No. This      13       bar code?      14       THE WITNESS: I don't know      15       because I didn't put it there.      16       Q. Isn't it a fact that's your bar code?      17       A. I don't know. I don't know what my bar      18       code is.      19       Q. How would you be able to find out?      20       A. You could take a physical copy of one      21       of my albums and look at my bar code.      22       Q. Okay. Is the bar code on anything we      23       have?      24       MR. KORIK: Sometimes, it's      25       on the Amazon listings.</p>	<p>1           Douglas Berlent      2         clients' music Songs For Dogs is available now for      3         listening at no cost at a site known as "Rhapsody"?      4         A. I'm not aware of that.      5         Q. Well, do you know of any way it would      6         have gotten on the site to be available to be      7         listened to other than through The Orchard?      8         A. Do I know of any other way that it      9         could have gotten on the site?      10       Q. That's right.      11       A. I'm sure there are other ways to do it,      12       yes.      13       Q. Okay.      14       A. Do I know how to? No.      15       MR. MONAGHAN: I don't      16       have any more questions at      17       this time. There may be      18       further occasion, depending      19       on other discovery in the      20       case of documents that are      21       forthcoming from you or some      22       other party or deposition      23       testimony that may require      24       you to come back and be      25       questioned further.</p>
[174]	[176]
<p>1           Douglas Berlent      2         MR. MONAGHAN: Yeah. Let's      3         see.      4         THE WITNESS: Music For      5         Lovemaking, for example.      6         MR. KORIK: No. Amazon      7         assigns its own bar code.      8         Q. Would you agree with me, Mr. Maxwell,      9         that in any instance where these products were      10       listed and a copyright notice was indicated either      11       with a c or with a p, it should have shown my      12       clients as the copyright owners?      13       A. Yes, it should have.      14       Q. Are you familiar with an Internet site      15       known as "Rhapsody"?</p>	<p>1           Douglas Berlent      2         MR. SHELOWITZ: I have a      3         few questions, if I may?      4         MR. MONAGHAN: Sure.      5         EXAMINATION BY      6         MR. SHELOWITZ:      7         Q. I'm just going to ask a few questions,      8         Mr. Maxwell. The same instruction, answer to the      9         best of your knowledge.      10       Did you ever sell any music of the      11       Plaintiffs that you've been shown today on      12       amazon.com?      13       MR. MONAGHAN: Objection      14       as a leading question from his      15       own lawyer.      16       Q. Did you, personally or through Media      17       Right Productions, ever sell any Dogs and Cats CDs      18       on amazon.com?      19       A. No, I did not.      20       Q. Did you ever sell any of the Dogs and      21       Cats CDs on any other on-line marketplace?      22       A. No, I did not.      23       Q. Earlier, in the questions, Mr. Monaghan      24       showed you some exhibits that showed what looked      25       like a p and a circle around it and the word</p>

<p style="text-align: right;">[177]</p> <p>1           Douglas Berlent      2 "Meditright" on web pages showing the Plaintiffs'      3 music or CDs; do you recall that?      4       A. Yes, I do.      5       Q. Do you know how those, if it is a p      6 with a circle and how it got there?      7       A. I have no idea.      8       Q. Did you ever authorize anyone to show      9 copyright ownership whether a c with a circle or a      10 P with a circle related to any of the music that      11 was produced, composed and contained in any of      12 those?      13      A. No, I did not.      14      Q. Did you ever represent that you were      15 the copyright owner regarding any of the music of      16 Plaintiffs?      17      A. No, I did not.      18      Q. Did you ever copy in any form      19 whatsoever, either you or Media Right Productions,      20 any of the CDs or tapes that the Plaintiffs had      21 shown us today as Exhibits 8, 9, 10, 9A or 8A?      22      A. No, I did not.      23      Q. Did you ever --      24        MR. MONAGHAN: This is      25       improper. Objection. Excuse me.</p>	<p style="text-align: right;">[179]</p> <p>1           Douglas Berlent      2 Productions were the artist that created, composed      3 or recorded any of the music that Plaintiffs claim      4 are set forth in those exhibits today?      5       A. No, I did not.      6       MR. SHELOWITZ: Thank you.      7       We have no questions.      8      9      10           Douglas Berlent      11 Sworn to before me this      12 day of      13 2008.      14      15           Notary Public      16                   * * *      17                   E X H I B I T S      18      Plaintiffs'     Description     Page      19      Maxwell-1    One-page document entitled   40      20                    "Recording a 'demo' CD"      21      Maxwell-2    Two-page document entitled   45      22                    "Media Right Productions"      23      24      25</p>
<p style="text-align: right;">[178]</p> <p>1           Douglas Berlent      2        MR. SHELOWITZ: I'm entitled      3 to cross-examine, ask the questions.      4        MR. MONAGHAN: Let me get my      5 objection on the record.      6        MR. SHELOWITZ: Please.      7        MR. MONAGHAN: Cross-examination      8 of your own client is limited to      9 correction of some answer that was      10 given, amplification of an answer.      11 It's not to make a case.      12       If you want to make a case,      13 you call him as a witness in the      14 trial in the case. It's not let's      15 go through the whole thing.      16       MR. SHELOWITZ: I have one      17 more question.      18       MR. MONAGHAN: Good.      19       MR. SHELOWITZ: I'm asking      20 questions you omitted in your      21 questioning. I think they're      22 relevant and important so that      23 the record is, absolutely, clear.      24       Q. Did you ever represent to anyone,      25 Mr. Maxwell, that either you or Media Right</p>	<p style="text-align: right;">[180]</p> <p>1           Douglas Berlent      2                   E X H I B I T S      3                   (Continued)      4      Plaintiffs'     Description     Page      5      Maxwell-3    Two-page document entitled   52      6                    "Product Representation      7                    Agreement"      8      Maxwell-4    One-page letter dated   52      9                    February 1, 2000      10     Maxwell-5    Two-page document which   53      11                   states at the top      12                    "From: The Orchard"      13     Maxwell-6    Excel spreadsheet   53      14     Maxwell-7    A document entitled "Songs   68      15                   For Cats/Songs For Dogs"      16                   and Bates-stamped 1 through      17                   32      18     Maxwell-8    A CD entitled "Songs For   68      19                   Dogs (and the people who      20                   love them)"      21     Maxwell-9    A CD entitled "Songs For   68      22                   Cats (and the people who      23                   love them)"      24      25</p>

			[181]	[183]
1	Douglas Berlent		1	Douglas Berlent
2	E X H I B I T S		2	REQUEST FOR PRODUCTION
3	(Continued)		3	(Continued)
4	Plaintiffs' Description Page		4	Page Line Description
5	Maxwell-10 A CD entitled "Songs For Dogs (and the people who love them)," 10 original songs on CD and a fully illustrated book	68	5	32 9 Any records that would show payments that were received by the company with respect to digital downloads from the year 1999 on
6			6	
7			7	
8			8	
9			9	
10	Maxwell-8A A cassette entitled "Songs For Dogs"	82	10	
11			11	
12	Maxwell-9A A cassette entitled "Songs For Cats"	83	12	
13			13	
14	Maxwell-10 Two-page amazon.com screen shot	109	14	
15			15	
16	Maxwell-11 Three-page rhapsody.com screen shot	109	16	
17			17	
18	Maxwell-12 Two-page amazon.com screen shot	109	18	
19			19	
20	Maxwell-13 Multipage document entitled "The Orchard, Digital & CD Distribution"	110	20	
21			21	
22			22	
23	Maxwell-14 Two-page document entitled "Elias' Links & Acknowledgements"	112	23	
24			24	
25			25	
			[182]	C E R T I F I C A T I O N
1	Douglas Berlent			I, Kathryn Lebeau, a Stenotype Reporter
2	E X H I B I T S			and Notary Public within and for the State of
3	(Continued)			New York, hereby certify:
4	Plaintiffs' Description Page			That the witness whose examination is
5	Maxwell-15 One-page iTunes screen shot regarding Songs For Cats	162		hereinbefore set forth was duly sworn by a
6				Notary Public and that the transcript of
7	Maxwell-16 One-page iTunes screen shot regarding Songs For Dogs	162		examination is a true record of the testimony
8				given by the said witness; and
9	Maxwell-17 One-page screen shot regarding "The Orchard, Release Info."	169		
10				
11				
12	* * *			
13	INFORMATION TO BE SUPPLIED			
14	Page Line Description			
15	52 7 Whether the witness has a copy of the Product Representation Agreement with regard to Smokin' Sounds, and, if so, the production of it			
16				
17				
18				
19	* * *			
20	REQUEST FOR PRODUCTION			
21	Page Line Description			
22	27 25 Mr. Maxwell's statements that would reflect payments he's received through The Orchard for digital downloading for the last year			
23				
24				
25				

Kathryn Lebeau

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